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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 509

EVVA GERTRUDE KING, ADMINISTRATRIX OF THE ESTATE OF ANDERSON J. KING, DECEASED,
Defendant—Petitioner

v.

BLANCHE J. SIMMONS, ADMINISTRATRIX OF THE ESTATE OF CRONER G. SIMMONS, DECEASED,
Plaintiff—Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Howard E. Manning
MANNING, FULTON & SKINNER
600 Capital Club Building
Raleigh, North Carolina

Joseph C. Moore, Jr.
YOUNG, MOORE & HENDERSON
Insurance Building
Raleigh, North Carolina

Attorneys for Respondent

BYNUM PRINTING CO — RALEIGH N. C.

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OBJECTIONS TO JURISDICTIONAL GROUNDS

The respondent contends there are no special and important reasons for a review on writ of *certiorari* under Supreme Court Rule 19 in this case. The decision of the Court of Appeals for the Fourth Circuit in affirming the judgment below is not in conflict with decisions of other Courts of Appeals, or decisions of the United States Supreme Court. Furthermore, a change in the applicable statutory law, Federal Rules of Civil Procedure 25 (a), after this action was begun, has rendered this action a matter of concern only between the petitioner and respondent and no longer a matter of public concern.

STATEMENT OF FACTS

In view of the questions raised by the petitioner in her petition, the following chronology of events in his case is important:

1. On December 4, 1959, this action was commenced in the Superior Court for Wake County, North Carolina, by the issuance of summons and the filing of respondent's complaint, and the summons and complaint were on the same day served upon the North Carolina Commissioner of Motor Vehicles as statutory process agent for the defendant, a non-resident motorist, and all necessary further steps for service on the defendant, including the sending of the summons and complaint to him by registered mail, were completed.

2. On December 22, 1959, the attorneys for the defendant filed a petition to remove this case to the United States District Court for the Eastern District of North Carolina, and also filed a notice of removal and bond on removal. The case was removed to the said Court.

3. On December 29, 1959, the defendant's attorneys filed an answer in his behalf admitting the collision, denying liability, and counterclaiming for $1,427.64 in property damage.

4. On January 7, 1960, the respondent moved the District Court for an order striking the Fifth Defense from the defendant's answer, on the grounds that it failed to state a legal defense.

5. On May 19, 1960, attorneys for the defendant gave notice of taking, pursuant to the Federal Rules of Civil Procedure, the oral deposition of one Frank Linn, a witness to the collision, on June 2, 1960, in Stuart, Florida. The said deposition was not taken pursuant to this motion.

6. On September 11, 1960, the defendant, Anderson J. King, died in New York of natural causes.

7. On December 29, 1960, the defendant's attorneys gave notice of the taking of the Linn deposition in Florida on January 11, 1961.

8. On January 11, 1961, the said deposition was taken in Florida, with both parties being represented by Florida attorneys.

9. On December 19, 1961, the defendant's attorneys filed continuing interrogatories under Federal Rule 33.

10. On December 28, 1961, the respondent answered certain of these interrogatories, objected to others, and objected to the continuing nature of the interrogatories.

(a) The plaintiff filed a Statement of Evidence, Proposed Issues, and Statement of Facts.

(b) The attorneys for the defendant filed a document entitled "Defendant's Testimony," stating, among other things, that the defendant "proposes to establish *by his own testimony*" certain facts, and might offer the testimony of a highway patrolman to corroborate this testimony.

(c) The Court signed a Consent Order extending the time for completion of discovery to November 1, 1962. This Order was signed by the attorneys for the respondent and the attorneys for the defendant.

13. On September 21, 1962, the respondent, pursuant to Federal Rule 33, filed interrogatories addressed to the defendant. On the same day, a stipulation as to facts and exhibits was filed by the attorneys for both parties.

14. On September 28, 1962, a Pre-Trial Order, dated September 22, 1962, was filed by the Court, stating among other things: "Both parties anticipate that the same will be ready for trial upon completion of discovery on November 1, 1962, without the necessity of additional Pre-Trial Conference. The case is therefore calendared for trial at the next Civil Term to convene in the Raleigh Division after November 1, 1962."

15. On October 3, 1962, the attorneys for the defendant mailed to the attorneys for the respondent a stipulation extending time to answer or object to respondent's interrogatories which were filed on September 21, 1962. The letter accompanying the stipulation stated, among other things:

> "We need time in order to get up with our client who, as you know, is a long-haul truck driver."

16. On November 6, 1962, the attorneys for the defendant filed objections to the respondent's interrogatories, in which they stated that they had learned, for the first time, on October 3, 1962, that the defendant was dead. It was only upon the receipt of these objections that the attorneys for the respondent, and the respondent herself, learned that the defendant had died. Neither the attorneys for the respondent nor the respondent herself knew at this time that the defendant had been dead for any considerable period of time, and assumed that his death was quite recent, because of the various procedural and other steps which both parties had taken at intervals throughout the history of the case, which would not have been appropriate had the defendant been dead.

17. On November 27, 1962, the respondent's attorneys, and through them the respondent, learned for the first time, through the attorneys for the defendant, that the defendant had in fact been dead for a considerable period of time, namely, more than two years.

18. The attorneys for respondent, on December 5, 1962, received from the attorneys for the defendant, photostatic copies of official records indicating (1) that the defendant, while still a resident of Vero Beach, Indian River County, Florida, died in Portland, New York, on September 11, 1960; (2) one Evva Gertrude King was appointed administratrix of the defendant's estate by the County Judge's Court in and for Indian River County, Florida, administered the estate, and filed a petition for

final discharge and final returns which were approved by the County Judge on April 20, 1962.

19. On December 7, 1962, the respondent filed a motion with the District Court suggesting the death of the defendant Anderson J. King and requesting that his administratrix, Evva Gertrude King, be substituted as defendant. Notice of the motion and hearing was served on Evva Gertrude King, Administratrix of the estate of Anderson J. King, in Florida by a United States Marshal.

20. On January 31, 1963, after a hearing at which Evva Gertrude King was represented by Mr. Willis Smith, Jr., of Smith, Leach, Anderson and Dorsett, Judge Preyer signed an order reciting that Evva Gertrude King was administratrix of the estate of Anderson J. King, and making her defendant in the place of Anderson J. King. (Appellant's Appendix p. 66). In this order, Judge Preyer, at the request of counsel for the defendant, stated his opinion that the order involved a controlling question of law within the meaning of 28 U.S.C. Sec. 1292 (b), so that an immediate appeal might materially advance the ultimate termination of the litigation.

21. Subsequently, counsel for the petitioner decided not to pursue an appeal prior to the trial of the case on the merits, and on March 7, 1963, Judge Preyer, at the request of counsel for the petitioner, entered an order reciting that Evva Gertrude King, administratrix of the estate of Anderson J. King, deceased, had elected not to appeal under the order and certification of January 31, 1963, but desired to preserve any rights the petitioner might have to object to the Court's ruling that Evva Gertrude King, administratrix of the estate of Anderson J. King be substituted as a party defendant in place of Anderson J. King, *for the reasons set out in the brief filed by the defendant in opposition to said motion for substitution of defendant Evva Gertrude King*, and dissolving the certification for appeal without prejudice in the event that the defendant desired to raise the same question if an appeal on

the merits ultimately became necessary. (Appellee's Appendix, p. 15A). *The defendant's brief in opposition to the motion for substitution of the original defendant's administratrix did not set out, as a reason for opposition to the motion, any claim or argument that Evva Gertrude King, administratrix of the estate of Anderson J. King, deceased, because of her discharge, had no capacity to represent the defendant in this action.*

22. On July 18, 1963, there was filed with the Clerk of the United States District Court for Eastern North Carolina a Stipulation of Fact wherein it was stipulated that the tractor-trailer which was owned by Anderson J. King, and which was involved in the accident out of which this case arose, was damaged in the amount of $1,427.64 as a result of said collision. It was signed for the defendant, Evva Gertrude King, administratrix of the estate of Anderson J. King, deceased, by Henry A. Mitchell, Jr. and by counsel for the plaintiff.

23. On the morning of October 7, 1963, just prior to the beginning of the trial on the merits, Mr. Willis Smith, Jr., attorney for the defendant, called the plaintiff's attorneys into Judge Bell's chambers and *for the first time* orally raised the question of whether the action could proceed against Mrs. King as the original defendant's administratrix, when she had been discharged as administratrix, no re-appointment had been made, and the estate had not been reopened. Judge Bell refused to dismiss the action for this reason, and after trial by the Court, entered judgment for the plaintiff in the amount of $24,750.00.

24. The petitioner, Evva Gertrude King, was present in the courtroom of the United States District Court for the Eastern District of North Carolina on October 7, 1963, when this action was tried and participated in the trial by sitting with her counsel.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT HOLDING THAT THE PETITIONER WAS ESTOPPED TO ASSERT THE TWO-YEAR LIMITATION OF RULE 25, FEDERAL RULES OF CIVIL PROCEDURE WAS PROPER.

The Court of Appeals for the Fourth Circuit in affirming the decision of the District Court that the petitioner was estopped to assert the two-year limitation of Federal Rule of Civil Procedure 25 (a) (1) said the case at the bar was on all fours with *Iovino v. Waterson*, 274 F. 2d 41 (2d Cir. 1959), *certiorari denied*, 362 U.S. 949, 80 Sup. Ct. 860, 4 L. Ed. 2d 867 (1960).

As will appear from the chronology of events in the case at bar, printed as part of the respondent's statement of facts, the original defendant, Anderson J. King, died of natural causes after this suit was filed, and for a long period of time the fact of his death was unknown to the attorneys on both sides of the litigation. The action was commenced in state court on December 4, 1959, and was removed on December 22, 1959. On September 11, 1960, the original defendant, Anderson J. King, died in New York State of natural causes. On December 29, 1960, his attorneys gave notice of the taking of a deposition in Florida on January 11, 1961, which was in fact taken on that date. On December 19, 1961, his attorneys filed continuing interrogatories under Federal Rule 23, which were answered in part and objected to in part by the plaintiff on December 28, 1961. A pre-trial conference was held on September 18, 1962, at which the original defendant's attorneys appeared and represented him as if he were alive, stating among other things that they proposed to establish certain facts by the testimony of the defendant himself, who by this time had been dead for more than two years. On September 21, 1962, the respondent filed interroga-

tories addressed to the original defendant, and on October 3, 1962, the original defendant's attorneys mailed the attorneys for the respondent a stipulation extending time to answer or object to the interrogatories, stating among other things that they needed time to get in contact with their client. At this time their client had been dead for two years and twenty-two days. On November 6, 1962, the attorneys for the original defendant informed the attorneys for the respondent, for the first time, that the original defendant was dead, and it was only on November 27, 1962, that the respondent's attorneys learned for the first time, through the attorneys for the defendant, that the original defendant had in fact been dead for a considerable period of time, namely, more than two years. On December 7, 1962, the respondent filed a motion for the substitution of the administratrix of the deceased defendant, and notice of the motion and hearing thereon was served upon her personally in Florida by United States Marshal. On January 31, 1963, after a hearing at which she was represented by her present attorney, Judge Preyer signed an order reciting that she was administratrix and making her defendant in place of the original defendant, Anderson J. King, on the authority of *Iovino v. Waterson*, 274 F. 2d 41 (2d Cir. 1959).

Judge Preyer and the Court of Appeals were correct in their conclusion that this case comes squarely within the rule of *Iovino v. Waterson*. In *Iovino*, as in the case at bar, the defendant's attorneys took steps after his death which would have been appropriate only had he still been alive, and which estopped the defendant's attorneys from taking advantage, under the then terminology of Federal Rule of Civil Procedure 25, of the plaintiff's failure to substitute the defendant's personal representative within two years of the defendant's death. In *Iovino*, the action was begun in March, 1955, in a State Court in New York. The defendant removed to the District Court. In April, 1955, the defendant died intestate, with the plaintiff's attorneys remaining ignorant of that fact. In May, 1955,

plaintiff's attorneys served a complaint on the attorney who appeared for the defendant, who accepted service and served an answer, and who in 1956, examined the plaintiff before trial and participated in pre-trial conferences in the District Court, without making mention of defendant's death. When the plaintiff's attorneys learned in the spring of 1958 that the original defendant had been dead for over two years, they promptly took steps to substitute an administratrix of the original defendant in his stead. On appeal, the District Court was held to have acted correctly in allowing this substitution even though it was made more than two years after the original defendant's death and even though a literal reading of the then language of Federal Rule of Civil Procedure 25 would not have allowed the substitution.

In an exhaustive opinion which sets forth in depth the history of the former version of Federal Rule of Civil Procedure 25 and various other applicable provisions of Federal law, and analyzes the cases construing them, a three-judge panel of the Court of Appeals for the 2nd Circuit held unanimously that under these circumstances the defendant's attorneys were estopped from taking advantage of the strict time limitation in Federal Rule 25. The holding in this regard is well summarized in the language of the Court at 274 F. 2d 51:

> "We need not go so far as to hold that an attorney appearing in the Courts of this Circuit is under a duty to keep himself and his adversary informed of his continued authority at all times. We do hold that an attorney so appearing must assure himself of the continued existence of his client before he takes affirmative steps in the client's behalf; that, in the absence of knowledge to the contrary, his adversary may properly assume he has done this; that a client who authorizes an attorney to represent him has impliedly so informed the adverse party; and that no advantage may be taken by the client's personal representative of the attorney's failure to ascertain the fact of the client's death."

If there be any distinction between the case at bar and *Iovino*, it is that the case at bar presents a stronger set of facts for reaching the same conclusion than did *Iovino*. Not only did the petitioner's attorneys in the case at bar take more steps in the period after their client's death than was the case in *Iovino*, they also, approximately two years after their client's death, informed respondent's attorneys and the Court at a pre-trial conference that they intended to prove certain facts by the testimony of the defendant, thereby directly leading respondent's attorneys to believe that the defendant still existed.

The petitioner seems to rely almost completely on *Anderson v. Yungkau*, 329 U.S. 482, 67 Sup. Ct. 428, 91 L. Ed. 436 (1947). The Court of Appeals in *Iovino* did not sidestep *Anderson v. Yungkau*, but dealt with it directly and decided it had no application to the state of facts in *Iovino*. As the Court of Appeals said in *Iovino*, at 274 F. 2d 50:

> "In *Anderson*, the Supreme Court was concerned with excusable neglect, not with estoppel."

By this petition, petitioner is seeking a writ of *certiorari* on almost identical facts as in *Iovino* where a writ of *certiorari* was denied and this with reference to a problem which has no future significance because of the 1963 Amendment to Federal Rule of Civil Procedure 25, which now allows substitution within ninety days of notice of the death of a party, regardless of how long the party has been dead. In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 Sup. Ct. 614, 99 L. Ed. 897 (1955), a writ of *certiorari* had previously been granted. Upon learning that a statutory change had rendered the case a matter of concern only between the parties, the writ of *certiorari* was dismissed by the Court, Justice Frankfurter speaking for the majority said at 349 U.S. 70, 99 L. Ed. 904.

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged con-

flict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of *certiorari* except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."

Under these circumstances, it is difficult to see what useful purpose could be served by denying the respondent her day in court with respect to a claim which has already been found by the District Court and the Court of Appeals to be meritorious.

None of the District Court and Courts of Appeals decisions cited by the petitioner on Page 12 of her brief are apposite to the case at bar. In *Hofheimer v. McIntee*, 179 F. 2d 789 (7th Cir. 1950), and *Fleming v. Sebastiani*, 161 F. 2d 111 (9th Cir. 1947), we are not told what, if anything, transpired between the death of the party in question and the expiration of two years from that time. Further, both cases were decided well before *Iovino v. Waterson* and it is impossible to say what the attitude of the respective courts would have been had they been called upon to decide the legal implications of the *Iovino* fact situation. *Starnes v. Penn. R. Co.*, 26 F.R.D. 625 (E.D. N.Y. 1961), specifically cites *Iovino* and does not criticize it on its fact situation, but says, at 26 F.R.D. 629:

> "In the case at bar, there is nothing in the conduct of the defendant from which can be fashioned a waiver of the limitation or an estoppel to invoke the rule."

Such, too, is the situation in *Zdanok v. Glidden Co.*, 28 F.R.D. 346 (S.D. N.Y. 1961), wherein the District Court quotes *Iovino* without criticism and states, at 26 F.R.D. 347:

> "There are no circumstances here which would give rise to waiver and estoppel as against these defendants."

In *Conley v. Gibson*, 29 F.R.D. 519 (S.D. Tex. 1961), there are no factors which could give rise to estoppel, as in *Iovino* or the case at bar.

THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT THAT THE PETITIONER BY FAILING TO OBJECT TO HER SUBSTITUTION ON THE GROUND THAT SHE HAD BEEN RELIEVED OF HER OFFICIAL STATUS AS AN ADMINISTRATRIX UNTIL THE DAY OF TRIAL WAIVED ANY POSSIBLE COMPLAINT ON THAT GROUND WAS PROPER.

The petitioner argues in her brief that she could not properly be substituted, as administratrix of the deceased original defendant, because at the time of the substitution an order had been entered by the Florida Probate Court discharging her as administratrix. Upon examination of the proceedings in this case and the applicable law, it will be seen that this point is not well taken.

True, the defendant administratrix in the case at bar was not formally reappointed. The reason was that the defendant never, prior to the very day of the trial on the merits, objected to her substitution on the grounds that she was no longer administratrix; an examination of the record will show that the objection made was that her reappointment, coming more than two years after the death of the original defendant, was simply too late under the provisions of Federal Rule of Civil Procedure 25. Indeed, Judge Preyer, in his order of January 31, 1963, recited that "Evva Gertrude King is administratrix of the estate of Anderson J. King, deceased, and may properly be substituted as defendant in his stead." (Appellant's Appendix, 66, 67).

As a part of this order, the petitioner obtained Judge Preyer's leave to appeal the question of the substitution immediately under the provisions of the 1958 Amend-

ment to the Interlocutory Appeals Act, 28 U.S.C. Sec. 1292 (b). Subsequently, Judge Preyer dissolved this order at the request of the petitioner and allowed the petitioner to reserve the right to appeal this point for the grounds set forth in a brief filed by the petitioner. (Appellee's Appendix p. 15A). The brief referred to, which the petitioner did not bring up as part of the record, was addressed almost exclusively to the question of whether the petitioner could be substituted more than two years after the original defendant's death, only obliquely referred to the fact that the present petitioner had been discharged as administratrix and that to substitute her as defendant in the case would not be consistent with the orderly administration of estates, and in no respect raised the point that she might be an improper party because of pure lack of legal capacity, having been discharged, to represent and bind the estate of the defendant in this action.

Thereafter a period of several months elapsed, and it was only on the morning of the day of the trial on the merits before Judge Bell that the petitioner's attorney called the attorneys for the respondent into Judge Bell's chambers, raised the question whether the petitioner administratrix was properly in the case inasmuch as she had been discharged as administratrix, and asked that the action be dismissed for that reason. This conference in Judge Bell's chambers appears nowhere in the record, and the petitioner's attorney made no formal written or oral motion which appears in the record for dismissal of the case on the specific ground that the petitioner had no capacity to represent the estate of the original defendant. However, in fairness to the petitioner, the respondent felt it necessary at this point in the brief to bring the fact of the occurrence of this conference to the Court's attention.

The only formal motion made by the petitioner for dismissal of the case, on the ground that the petitioner had been discharged as administratrix and could not properly be in the case, is the petitioner's motion for involuntary

dismissal under Rule 41 (b), made at the end of the trial on the merits.

The fact is that the petitioner's attorney never made it clear to the trial court whether he represented the petitioner in her individual or representative capacity, or indeed whether he represented her at all. He appeared and represented her at the hearing on the original motion to substitute her as defendant. On the other hand, at the trial, in a colloquy with Mr. Manning and Judge Bell, he in effect refused to say whether he represented her at all and if so, in what capacity; this occurred after he had participated in the trial, ostensibly in the role of her attorney (Appellee's Appendix, p. 13A). His failure even on appeal to take an unequivocal stand on this point is indicated by his filing a notice of appeal, and furnishing appeal and supersedeas bonds, in the petitioner's name individually, and not as administratrix — an omission which the respondent's attorneys requested that he clarify, which request led to the writing of a letter to the Clerk of the Court of Appeals for the Fourth Circuit asking that language describing the petitioner's representative capacity be added after her name in the documents which had been filed.

The respondent's position on this entire point is simply that the petitioner's attorney, by his various actions and failures to act, has effectively waived this objection. He made no effort to appeal from those portions of Judge Prevet's substitution order which recited that the defendant was administratrix of the estate of the original defendant. He signed a stipulation of fact filed July 18, 1963, concerning the amount of damages to the tractor-trailer owned by the original defendant which indicated petitioner was going to pursue the counterclaim posed by the original defendant. He did not raise until the very day of trial the question of whether her discharge resulted in a lack of capacity to represent the estate of the original defendant. At the trial, when specifically questioned by the trial judge as to whom he represented, he refused to say. (Appellee's Appendix, p. 13A). In appealing the

case, he appealed in the name of the present petitioner as an individual, in spite of the fact that she as an individual was never made a party to the case.

It is respectfully submitted that what the petitioner has done here brings her squarely within the rule enunciated in *Bush v. Remington Rand*, 213 F. 2d 456 (2d Cir. 1954). There, one of the plaintiffs died in 1945. Her estate was settled and distributed in 1947, hearings on the merits before a special master were begun in 1949, and no attempt was made by the defendant to raise the issue of failure to substitute the personal representative of the deceased plaintiff until after the completion of those hearings. On this state of facts, the Court of Appeals for the Second Circuit said, at 213 F. 2d 464:

> "Since the personal representative had not been made a party, dismissal under Rule 25 (a) would ordinarily follow, but he (the District Judge) found that the defendant by its long delay in raising the issue, had waived its right to object and was estopped from invoking the rule. Thus, pursuant to Federal Rule 21, which permits the District Court to add or drop parties at any stage of the proceeding on such terms as are just, he allowed the daughter Isabel D. Bush, Administratrix d.b.n. c.t.a. of the estate of Birney Dysart under Probate Court decree of August 16, 1949, to be added as party plaintiff in the first action.
>
> "We can see no error in this decision. The defendant knew of Mrs. Dysart's death as early as 1946, and if objection had been made at least prior to the hearings in 1949, those proceedings would have been greatly simplified and much time and expense would have been saved. Having stood by while the plaintiffs expended money and effort in bringing the case to judgment, the defendant should no longer be allowed to object. The defendant, in disputing this decision, relies on *Anderson v. Yungkau*, 329 U.S. 482, 67 Sup. Ct. 428, 91 L. Ed. 436 . . ."

"However, we do not think the *Yungkau* case is controlling here where the issue is not the discretion of the Trial Court but waiver by the parties."

The petitioner's attorney long knew that the petitioner had been discharged as administratrix of the original defendant in Florida. The order of discharge, which the petitioner prints at Page 24 of her Appellant's Appendix, was indeed procured by her attorney and furnished by him to the attorneys for the respondent prior to the time when they made their motion to substitute the personal representative of the deceased defendant. Yet the petitioner's attorney waited until the morning of the trial on the merits to make the contention that this discharge resulted in a noncapacity of the petitioner administratrix to represent the original defendant, and made no formal motion covering this point until he moved for involuntary dismissal at the end of the trial on the merits. Under the Rule of *Bush v. Remington Rand*, this appears to be a clear waiver of the right to raise this point.

Pertinent decisions on this issue are, as might well be expected, rare. In addition to the *Bush* case, the respondent's attorneys have been able to find three other cases which indicate that the general law in the United States is that questions with respect to capacity to sue or be sued constitute matters which may be waived. In *Chevers v. Burke's Adm.*, 10 La. 429 (1841), where the defendant filed an answer after a default judgment against her and asserted in the answer that she was not the deceased administratrix it was held error to set the judgment aside, on the ground that she had previously admitted the capacity in which she was sued. In *Wayland v. Porterfield's Exec.*, 58 Ky. 638 (1859), where the defendant had entered a plea of payment in a suit on contract, it was held that this estopped him to controvert the fact that the plaintiff was the executor of the deceased party whom he purported to represent. And in *Ferguson v. Harder*, 141 Misc. 466, 252 N.Y.S. 783 (1931), it was held that the filing of an answer waived objection that a foreign administrator

had no capacity to sue because he had not obtained ancillary letters.

The petitioner originally had the opportunity to dispose of this question by interlocutory appeal, which would have saved the time of all concerned. She elected not to pursue this course, and in preserving her right to appeal from the ultimate decision on the merits, restricted herself to appealing on the grounds that substitution of parties came too late. She then allowed months to elapse before the trial on the merits, without raising the question that she had no capacity to be a defendant in the case, and first raised the point informally at the beginning of the trial, raising the point formally only by general motion for involuntary dismissal at the end of the trial on the merits. It is respectfully submitted that there has been a full and effective waiver of the right to complain in this Court about this aspect of the case. Had the point been raised at any reasonable time prior to trial on the merits the respondent could, under the applicable Florida statutes, have had the petitioner or someone else reappointed as administratrix. The unfairness of making this demand on the very day of the trial on the merits was apparent to the Court of Appeals for the Fourth Circuit.

That petitioner relies heavily upon *Mallonee v. Fahey*, 200 F. 2d 918 (9th Cir. 1952), that only the legal representative of a party may be substituted under Rule 25 (a) (1). However, an examination of the *Mallonee* case reveals it is not in point with this decision. In *Mallonee*, the plaintiff attempted to substitute under Rule 25 (a) (1) the successors in office of the deceased. The Court said that Rule 25 (d) provides for the substitution of successors in office.

The petitioner further raises the question of jurisdiction of the District Court over her person. When this action was tried in the District Court the petitioner, Evva Gertrude King, was present. In *Pulley v. Pulley*, 255 N.C. 423, 121 S.E. 2d 876, (1961), the North Carolina

Supreme Court laid down the following general rules concerning jurisdiction of the person:

> "Jurisdiction of the subject matter cannot be conferred upon a court by, or be based on, the estoppel of a party to deny that it exists. As to other objections to jurisdiction, there may be an estoppel, as in the case of objections to the manner in which, or the steps by which, the court obtained jurisdiction, or to the venue.
>
> "One who invokes or voluntarily submits to the exercise by a court of its jurisdiction upon a matter of which it has power to take cognizance is estopped from subsequently objecting thereto.
>
> "An absolute want of jurisdiction over the subject matter may be taken advantage of at any stage of the proceedings, even after judgment. However, 'an objection to jurisdiction based on any ground other than lack of jurisdiction of the subject matter, such as lack of jurisdiction of the person or irregularity in the method by which jurisdiction of the particular case was obtained, is usually waived by failure to raise the objection at the first opportunity, or in due or seasonable time, or within the time prescribed by statute'."

This action being between a citizen of North Carolina and a citizen of Florida for an amount in excess of $10,000.00, there is no question of the District Court having jurisdiction of the subject matter. The petitioner by her failure to object to her substitution until the day of the trial and by her appearance and participation in the trial of this action clearly waived any irregularities as to jurisdiction of her person.

The Court of Appeals for the Fourth Circuit correctly decided the applicable law in this case. The petitioner filed on July 8, 1964, a Petition for Rehearing concerning the same points raised in the present petition. The Court of Appeals denied the Petition for Rehearing on July 16, 1964.

CONCLUSION

The respondent submits that this petition presents no special and important reasons for a review on writ of *certiorari* and that this petition should be denied.

Respectfully,

Howard E. Manning of
MANNING, FULTON & SKINNER
600 Capital Club Building
Raleigh, North Carolina

Joseph C. Moore, Jr. of
YOUNG, MOORE & HENDERSON
Insurance Building
Raleigh, North Carolina

Counsel for Respondent